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No. 02-1315

In the

SUPREME COURT OF THE UNITED STATES

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Brief Of The States Of Vermont, Massachusetts, Missouri, Oregon And South Dakota And Of The Commonwealths Of The Northern Mariana Islands And Puerto Rico

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INTEREST OF THE AMICI CURIAE

The *Amici Curiae* ("Amici States" or "States") are all sovereign States or Commonwealths whose Constitutions and statutes attempt to balance the competing interests of allowing persons freely to practice their religious beliefs, while avoiding public funding of those beliefs and practices. Each State seeks to strike this balance differently, but all *Amici* States have a vital interest in ensuring the continuing viability of their own laws concerning religious liberty.

The Court's decision in this case could affect numerous constitutional provisions and laws from around the country. A number of States impose greater restrictions on the provision of public monies to religious pursuits or institutions than is required by the Establishment Clause. Similarly, many States have given religious groups exemptions from State laws to accommodate their religious practices – even when the Free Exercise Clause would not mandate the accommodation. Such approaches to religious freedom, developed to reflect the needs, values and peoples of each State, fall within the sphere of permitted government action that lies between the Free Exercise and Establishment Clauses.

INTRODUCTION AND SUMMARY OF ARGUMENT

Both before and after adoption of the First Amendment, State Constitutions have insisted on a careful separation between church and state. This separation is grounded, not in hostility toward religion, but in a strong desire to protect religious liberty. As De Tocqueville observed over one hundred and fifty

years ago, religion flourishes under this framework. *See* 1 Alexis De Tocqueville, *Democracy in America* 319 (Knopf 1945) (attributing America's "peaceful dominion of religion . . . mainly to the separation of church and state"). The question presented in this case is whether State Constitutions will continue to have a role in establishing the dividing line between church and state.

Washington's decision to follow its Constitution and not fund scholarships for theological degrees is consistent with the Free Exercise Clause of the First Amendment. While Respondent Davey has a right to pursue that degree, cases such as *Harris v. McRae*, 448 U.S. 297 (1980) and *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), firmly establish that he has no right to do so at public expense. The Promise Scholarship program imposes no State-created barrier to Davey's free exercise of religion, nor does it coerce Davey into violating his religious beliefs. He remains able to pursue a theology degree at his own expense, and he may qualify for a Promise Scholarship to pursue a secular degree at another institution. The State's subsidy program leaves him in no worse position than he would have been in had the State not funded any scholarships.

The Ninth Circuit improperly relied upon "public forum" cases decided under the Free Speech Clause to invalidate Washington's law. States do not create public forums whenever they establish programs that subsidize certain activities while not subsidizing others. The heightened scrutiny of public forum analysis is applicable in the subsidy context only when

the government intends the funding program to create a forum for expression. The Promise Scholarship program was not designed to create such a forum. Moreover, if Washington's program were subject to public forum scrutiny, it would call into question governmental funding schemes from across the country. The Constitution does not require such a result. Washington's scholarship program is simply a funding mechanism. Absent the creation of an actual public forum, decisions concerning the allocation of scant public resources should be left to the democratically-elected representatives of the people.

The most troubling aspect of the Ninth Circuit's ruling is that it federalizes and eliminates any meaningful State role in setting church-state policy. Under the lower court's construction of the First Amendment, that which is not prohibited by the Establishment Clause is mandated by the Free Exercise Clause. This is not the law. Between the two Religion Clauses lies an important zone where individual States may come to differing conclusions as to the best means of attaining religious freedom. Some State Constitutions place stricter limits on the distribution of public monies for religious endeavors than those set forth in the Establishment Clause. These Constitutions envision a strong separation between church and state, not as a form of discrimination, but as a means of assuring the continuing vitality and independence of both spheres. In the same regard, many States permit religious groups greater exemptions from general State laws than may be required under the Free Exercise Clause. Based on their unique histories and experiences, States

take diverse paths to religious liberty. Unless there is actual interference with religious activities or beliefs, or the establishment of religion, those approaches do not violate the First Amendment.

ARGUMENT

I. Washington's Promise Scholarship Program Does Not Violate The First Amendment

Washington's decision to follow the dictates of its Constitution and not extend public subsidies to those seeking theology degrees is in harmony with the First Amendment. U.S. Const. amend I. Washington's Promise Scholarship program erects no State barrier to Respondent Davey's study of religion, and he remains able to pursue his theology degree at his own expense. The State's refusal to pay for his studies simply does not burden Davey's constitutional rights.

A. Consistent With The Free Exercise Clause, A State May Decline To Subsidize The Pursuit Of Theology Degrees

This appeal is governed by the Court's rulings holding that the government is not required to subsidize citizens' exercise of their constitutional rights. *Harris v. McRae*, 448 U.S. 297 (1980), upheld Congress's decision not to provide Medicaid monies for medically-necessary abortions, even though it extended such funding for costs related to childbirth. *Id.* at 315-18. While a woman's right to an abortion is secured by the Constitution, the Court held that a woman has no concomitant right to obtain government funding for the procedure. *Id.* at 316 ("it simply does not follow that a

woman's freedom of choice comes with a constitutional entitlement to the financial resources to avail herself of the full range of protected choices"). The Medicaid program left McRae "with at least the same range of choice" as she would have had if the government had funded no healthcare costs. *Id.* at 317. The government's decision to fund childbirth costs imposed no government burden on a woman's right to choose. The Court concluded that "[a]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Id.* at 316; *accord Maher v. Roe*, 432 U.S. 464, 474-76 (1977); *see DeShaney v. Winnebago Co. Dep't of Social Servs.*, 489 U.S. 189, 196 (1989) ("no affirmative right to governmental aid").

Most on point is *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983). There, the Court upheld a statute that denied tax-exempt status -- a form of government subsidy -- to non-profit corporations that engaged in substantial lobbying, but exempted veterans' organizations from the law. The Court rejected the notion that Congress's choice to subsidize one group's lobbying and not another's impinged upon any First Amendment interest. Appellant Taxation With Representation ("TWR") remained free to engage in lobbying; "Congress has merely refused to pay for the lobbying out of public monies." *Id.* at 545. Further, TWR could continue to lobby *and* retain tax-exempt status, so long as it performed the lobbying through a separately-incorporated entity. *Id.* at 544 n.6.

The Court expressly refused to subject Congress's discretionary funding decisions to strict scrutiny:

> This is not the law. Congress could, for example, grant funds to an organization dedicated to combatting teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures. Under *Cammarano*, such a statute would be valid. Congress might also enact a statute providing public money for an organization dedicated to combatting teenage alcohol abuse, and impose no condition against using funds obtained from Congress for lobbying. The existence of the second statute would not make the first statute subject to strict scrutiny.

Id. at 548-49.

The sole limitation the Court set on such funding choices was that the congressional decision could not be "aimed at the suppression of dangerous ideas." *Id.* at 550 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)). Otherwise, the Court's precedents establish that the government has broad discretion to make funding decisions.

Washington's Promise Scholarship fits comfortably within the constitutional confines of *Harris* and *Regan*. While Davey unquestionably has a right to pursue a theology degree, he has no corollary right to obtain

that degree with public assistance, even if the State provides support for other studies. As in *Harris*, Washington has erected no State barrier to his pursuit of such a degree or his free exercise of religion. He remains in no worse position than if the State had not offered scholarships to pursue any course of study. As Justice Douglas opined:

> The fact that the government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.

Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring); *Lyng v. Northwest Indian Cemetery Ass'n*, 485 U.S. 439, 451 (1988) (noting same).

Washington's decision not to fund theology studies mirrors governmental choices made in numerous contexts. States may provide grants for study at in-state schools and not for out-of-state institutions. They may enact scholarships for medical degrees but not for law degrees. At most, Washington's law fails to reduce the monetary cost of Davey's studies. But, such a consequence presents no Free Exercise problem. *Braunfield v. Brown*, 366 U.S. 599, 605 (1961) (Sunday closing laws that made exercise of religion "more expensive" did not violate Free Exercise Clause)

(plurality opinion); *see Maher,* 432 U.S. at 474 (government failure to reduce cost of obtaining abortion does not burden right to choose).

In addition, Davey can both obtain the benefits of the scholarship and pursue his theology degree. He may seek one degree with his scholarship monies while pursuing a theology degree at a different school utilizing his own funds. This is closely analogous to *Regan,* where TWR could maintain its tax-exempt status if it incorporated a separate entity to perform its lobbying activities. As in *Regan*, Davey can obtain the benefits of the program and exercise his religious beliefs. That such a choice may be difficult or less financially attractive, does not present a concern of constitutional dimension.

B. Washington's Constitutionally-Grounded Policy Against Funding Theology Degrees Is Aimed At Furthering Religious Liberty, Not At Suppressing "Dangerous Ideas"

Washington's scholarship program is not designed to "suppress dangerous ideas." *Regan*, 461 U.S. at 550. The Promise Scholarship program exempts theology degrees to comply with Washington's Constitution, which contains heightened protections against the use of public funds to finance religious educations. Wash. Const. art. I, sec. 11; *Davey v. Locke*, 299 F.3d 748, 758 (9th Cir. 2002). Such a goal is not constitutionally suspect.

Laws passed to ensure the separation of church and state are not aimed at the suppression of religion.

Countless decisions of the Court have relied upon the Establishment Clause to invalidate laws, not with a goal of squelching religion, but out of a legitimate desire to maintain church-state separation. *See, e.g., School Dist. of Abbington Twp. v. Schemp*, 374 U.S. 203, 217-21 (1963). Such a separation has long been considered to be beneficial to both the government and religion. *Id.* at 226-27; *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 212 (1948) (Denying public schools the ability to teach religion does not "manifest a governmental hostility to religion . . . . [T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."). Viewing Washington's law as an effort to oppress religion would be in conflict those decisions.

Moreover, the Promise Scholarship program is blind toward religious belief and exercise. Scholarship recipients remain free to engage in religious practices and speech, and to offer religious viewpoints on issues. They can participate in religion classes or attend religious colleges. A recipient could even be a minister, rabbi or priest and still obtain a Promise Scholarship. The only thing a recipient can not do is use public funds to obtain a degree in religion. Nothing about the Promise Scholarship program has the purpose or effect of stamping out religion. Indeed, the Washington Constitution secures its citizens with "[a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship." Wash. Const. art. I, sec. 11. Whether or not observance of the State's constitutional mandate presents a compelling interest,

cf. Widmar v. Vincent, 454 U.S. 263, 276 (1981), it certainly presents a legitimate basis for the funding limitation involved in this case.

C. The Promise Scholarship Program Does Not Burden Or Penalize Davey's Exercise Of His Constitutional Rights

The Ninth Circuit construed the scholarship program as burdening Davey's Free Exercise rights only because it lost sight of the distinction between a funding decision and a law directly restricting religious liberty. The rulings relied upon by the lower court, *McDaniel v. Paty*, 435 U.S. 618 (1978) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 510 (1993), both involved direct and substantial burdens placed by the government upon First Amendment rights. They are inapposite to this case.

The Tennessee law invalidated in *McDaniel v. Paty* disqualified ministers from seeking elective office. The Court found that Paty had a constitutional right both to be a minister and to run for office. Tennessee's law effectively precluded him from exercising both of those rights. As a result, the State had erected a direct, legal barrier to Paty's exercise of his constitutional rights. *See also Torcaso v. Watkins,* 367 U.S. 488 (1961) (Maryland law requiring elected officials to swear oath attesting to their belief in God violated the Free Exercise Clause).

The opposite is true here. As argued above, Davey has no constitutional right to obtain public funding for his private educational pursuits. In addition,

Washington created no barrier to his exercise of his rights. Davey remained eligible both to pursue a theology degree with private funds and to pursue a secular degree with scholarship funds. As in *Harris*, Davey was in no worse position than if the Promise Scholarships had never been offered.

City of Hialeah is even further afield. There, the city passed a law criminalizing the ceremonial slaughter of animals when not done for the purpose of food consumption. 508 U.S. at 527-28. This constituted an outright, governmental prohibition of the ritual sacrifice of animals, which is a practice of the Santeria faith. *Id.* at 524-25; *Strout v. Albanese*, 178 F.3d 57, 65 (1st Cir.) (noting same), *cert. denied*, 528 U.S. 931 (1999). The difference between such a direct and invidious constraint on religious liberty and the funding program at issue in this case is stark. *Braunfield*, 366 U.S. at 605-06 (law requiring "financial sacrifice in order to observe their religious beliefs . . . is wholly different than when the legislation attempts to make a religious practice itself unlawful") (plurality opinion).

Likewise, the Ninth Circuit mistakenly concluded that Washington's scholarship program amounts to an impermissible "penalty" on Davey's decision to pursue a theology degree. The lower court's invocation of cases arising in the area of unemployment benefits in support of that conclusion, misconstrues those precedents. In *Sherbert v. Verner; Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981); and *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987), the Court "invalidated state

unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion." *Employment Div. v. Smith,* 494 U.S. 872, 883 (1990).[1] The parties in those cases were forced to violate their religious beliefs in order to obtain the benefits of the program. Such governmental "coercion" was the critical factor underlying the unemployment cases. *See, e.g., Hobbie*, 480 U.S. at 141 (government may not condition benefit so as to put "substantial pressure on an adherent to modify his behavior and to violate his [religious] beliefs"); *cf. Lyng*, 485 U.S. at 450 (laws "which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [do not] require government to bring forward a compelling justification").

Such coercion is patently lacking in this case. As the Court explained in *Harris,* had the government refused to provide *all* Medicaid benefits to women who obtained abortions, it would likely be an unconstitutional penalty on the right to choose. *Harris*, 448 U.S. at 317 n.19. Instead, the government program at issue in *Harris* constituted "simply a refusal to subsidize certain protected conduct." *Id.; see Regan*, 461 U.S. at 545 (law does not "deny TWR any *independent benefit* on account of its intention to lobby" (emphasis added)). Thus, Washington plainly could not deny all public benefits to Davey based solely upon his pursuit of a theology degree. Barring that type of

[1] As the *Smith* Court also noted, those decisions have now largely, if not exclusively, been cabined within the context of unemployment benefits. 494 U.S. at 883-85.

independent burden, however, the Promise Scholarship program is on all fours with *Harris* and *Regan*. Its limited scope may "confront some applicants for benefits with choices, but in no sense does it affirmatively compel [applicants], by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct they find objectionable for religious reasons." *Bowen v. Roy*, 476 U.S. 693, 703 n.14 (1986) (opinion of Burger, C.J., Rehnquist & Powell, JJ.).

The government has greater discretion in its funding decisions than it does when it wields its power directly. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998). While it may not prohibit Davey from pursuing a religion degree, it need not provide public monies to subsidize his endeavor. As in *Harris* and *Regan*, Washington's Promise Scholarship program and the constitutional provision that compelled it, do not impermissibly burden Davey's constitutional rights.

II. Public Forum Cases Decided Under The Free Speech Clause Are Inapplicable To This Funding Program

This Court's rulings concerning the regulation of public forums do not counsel a different result. The Ninth Circuit's reliance upon cases such as *Rosenberger v. Rector & Visitors of the Univ. of Virginia,* 515 U.S. 819 (1995), to support subjecting the Promise Scholarship program to heightened scrutiny, was misplaced. 299 F.3d at 755-57. A government-spending program does not fall under the *Rosenberger* line of cases unless the system is designed to create a

public forum for expression. That intent is lacking in this instance.

A. Washington's Funding Program Does Not Create A Public Forum

Rosenberger employed public forum analysis only after determining that the funding scheme created by the University of Virginia had been designed with the specific intent of establishing an expressive forum. The University's Student Activities Fund ("SAF") paid for the printing and other expenses of numerous student groups. *Id.* In other words, the University gave "public money to student groups who wished to publish." *United States v. American Library Ass'n,* 123 S.Ct. 2297, 2305 (2003) (plurality opinion). Based upon the stated purposes of the SAF, the Court concluded that the University had created a *de facto* public forum designed to "encourage a diversity of views from private speakers." 515 U.S. at 834.

Other cases from this Court confirm that a funding plan is not subject to public forum scrutiny unless the program is designed to create a forum for private expression. In *Board of Regents v. Southworth*, 529 U.S. 217 (2000), the Court utilized public forum/ viewpoint neutrality review in upholding the constitutionality of a student activity fee charged by the University of Wisconsin. It applied public forum analysis only after concluding that the purposes for which the University had created the student activity fee mirrored those of the University of Virginia in *Rosenberger*. "The University of Wisconsin exacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students." 529 U.S. at 229.

Outside of the student activity monies in *Rosenberger* and *Southworth* – which were obtained to create public forums for diverse private expression – the Court has been chary of applying public forum analysis in the context of government spending programs. *National Endowment for the Arts v. Finley* rejected *Rosenberger's* applicability to a federal program that subsidized certain art projects. Based upon the program's focus upon artistic excellence, it was not designed, as was the University of Virginia's in *Rosenberger*, to "indiscriminately 'encourage a diversity of views from private speakers.'" 524 U.S. at 586 (quoting *Rosenberger*, 515 U.S. at 834). The Court held:

> So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities. Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." 500 U.S., at 193, 111 S.Ct., at 1772. In doing so, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Ibid.*

Id. at 588; *see Maher,* 432 U.S. at 475.

Most recently, five members of the Court agreed that the federal government did not create a public forum by offering subsidies to libraries to help them offset the costs of Internet access. *See American*

Library Ass'n, 123 S.Ct. at 2305 (plurality opinion); *id.* at 2310 (Breyer, J., concurring in the judgment). To create a public forum, the government "must make an affirmative choice to open up its property for use as a public forum." *Id.* at 2305; *see Santa Fe Independent School Dist. v. Doe*, 520 U.S. 290, 303 (2000). The Plurality stated:

> A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves. It provides Internet access, not to "encourage a diversity of views from private speakers," but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.

Id. (internal citation omitted). The same may well be said of the Promise Scholarship program.[2]

[2] *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001), is not to the contrary. There, the government created a program to fund legal representation for indigent litigants seeking welfare benefits. Congress refused to extend that funding to counsel who argued against the validity of existing welfare laws. The Court concluded that Congress was not able, consistent with the First Amendment, to pay for legal representation but limit the legal theories and advice that might be given during that relationship. While the Court analogized to public forum cases, it acknowledged that such decisions were not controlling in examining government subsidies. 531 U.S. at 543. Moreover, its ultimate holding was based primarily on the Court's conclusion that the subsidy restriction was designed to "insulate the Government's interpretation of the Constitution from judicial challenge." *Id.* at 548. As such, the funding scheme was organized to suppress "ideas thought inimical to the Government's own interest." *Id.* at 549. That government subsidy programs, including Washington's, cannot be manipulated to "suppress dangerous ideas" is beyond cavil. *See Regan*, 461 U.S. at 458.

Consequently, the Court's public forum precedents do not provide controlling authority over the issue presented in this appeal.[3] Instead, the Promise Scholarship program should be upheld under the traditional case law dealing with the constitutionality of governmental subsidies.

B. Applying The Heightened Scrutiny Of Public Forum Decisions Would Call Into Question Numerous Federal And State Programs

If government-spending programs such as Washington's are subject to heightened scrutiny as public forums, numerous laws on both the federal and state levels could be called into doubt. For example, federal funding programs often preclude the use of public monies for religious or partisan political purposes. The Tribally Controlled Colleges or Universities Grants Program provides that its funds "shall not be used in connection with religious worship or sectarian instruction." 25 U.S.C. §1803.[4] Likewise,

As argued *supra*, at Section I(B), the Promise Scholarship program has no such aim or purpose.

[3] The Amici States urge the Court not to expand public forum analysis to new areas such as scholarship programs. Several Justices have noted in a different setting that the Court should be "wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area." *Denver Area E. Telecommunications Consortium v. F.C.C.*, 518 U.S. 727, 749 (1996) (opinion of Breyer, J.), *quoted in American Library Ass'n*, 123 S.Ct. at 2305 n.3; *see Rosenberger* 515 U.S. at 852 ("Grand Unified Theory []may turn out to be neither grand nor unified")(O'Connor, J., concurring).

[4] *See also* 20 U.S.C. §1062(c)(1) (higher education grants may not be made under this chapter for any educational program, activity or service related to sectarian instruction or religious worship, or provided by a school or department of divinity"); 20 U.S.C. §1066c(c) (federal loan guarantees can not be used in connection with "any educational program, activity or

the National Youth Anti-Drug Media Campaign prohibits its funds from being used for "partisan political purposes." 21 U.S.C. §1802.

State laws also set similar limits and boundaries on the uses of public funds. At least ten States refuse, as does Washington, to permit public scholarship funds to be used to finance religious studies at colleges and universities.[5] Some States decline to extend public

service related to sectarian instruction or religious worship or provided by a school or department of divinity or to an institution in which a substantial portion of its functions is subsidized in a religious mission"); 20 U.S.C. §1068(e) (educational grants "may not be used . . . for a school or department of divinity or any religious worship or sectarian activity"); 25 U.S.C. §3306 (Higher Education Tribal Grants may not be used "for study at any school or department of divinity or for any religious worship or sectarian activity"); 42 U.S.C. §5001(a)(2) (grants for elderly may not include "projects involving the construction, operation, or maintenance of so much of any facility used or to be used for sectarian instruction or as a place of worship"); 42 U.S.C. §9858k(a) (child care block grants may not be "expended for any sectarian purpose or activity, including sectarian worship or instruction").

[5] Ala. Code §16-33A-1(4)(f) (2002) (an eligible student is "not enrolled and does not intend to enroll in a course of study leading to an undergraduate degree in theology or divinity"); La. Rev. Stat. Ann. § 1675(5) ("A person shall be eligible for consideration for a scholarship if . . . [h]e shall not be a major in religious studies or theology."); Mich. Comp. Laws §390.994(2) ("A grant shall not be made under this act to a student who is enrolled in a program of study leading to a degree in theology, divinity, or religious education."); Mo. Ann. Stat. §173.215(1.6) ("no award shall be made under sections 173.200 to 173.230 to any applicant who is enrolled, or who intends to use the award to enroll, in a course of study leading to a degree in theology or divinity."); N.J. Stat. Ann. §18A: 71B-20(b) ("A student who is enrolled in a course leading to a degree in theology or divinity shall not be eligible for a tuition aid grant."); N.Y. Educ. Law §661(6) ("no such awards shall be used to obtain professional instruction in theology"); Or. Rev. Stat. §348.186(3) ("The Oregon Student Assistance Commission may not award an Oregon Achievement Grant to a qualified student who is enrolled in a course of study required for and leading to a degree in theology, divinity or religious education."); S.C. Code Ann. §59-113-20(e) (a qualified applicant "is not enrolled in a course of study leading to a degree in theology, divinity, or religious education"); S.D. Codified Laws

monies to partisan political endeavors. *See, e.g.*, Tenn. Code Ann. §43-20-212 (board created to promote soybean products can not use funds for political purposes); *Schulz v. State*, 654 N.E.2d 1226, 1230 (N.Y) (New York Constitution precludes using public funds for partisan causes), *cert. denied*, 516 U.S. 944 (1995).

All of these funding programs are the product of Constitutions or statutes and, thus, reflect the will of the citizenry. Absent an attempt to stamp out "dangerous ideas," decisions of legislatures as to how best and most appropriately to apportion limited public resources should be respected. Importing public forum analysis in this context is unnecessary, unwarranted and would suggest the unconstitutionality of many federal and state programs. The Constitution does not require such a result.[6]

Codified Laws §13-55B-1(2) ("Qualified student . . . is not enrolled in a course of study leading to a degree in theology or religious education[.]"); Wis. Stat. Ann. §39.30(2)(d) ("No grant shall be awarded to members of religious orders who are pursuing a course of study leading to a degree in theology, divinity or religious education.").

[6] If the Court's public forum decisions do provide guidance in this case, they support the constitutionality of Washington's law. Not every government forum must be open, without limitation, to all types of expressive activity. Even where some expression occurs in the context of a forum, the forum may be "nonpublic." *Cornelius v. NAACP Legal Defense Fund, Inc.*, 473 U.S. 788, 802-03 (1985). Or, the government may create a public forum "for a limited purpose such as use by certain groups or for the discussion of certain topics." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (citation omitted). Given the limited purposes and availability of the Promise Scholarship, it should be considered either a nonpublic forum or, at most, a limited public forum. In either event, so long as it is reasonable and does not discriminate based on viewpoint, confining such "a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." *Rosenberger*, 515 U.S. at 829. Washington's program does not discriminate based on viewpoint, it simply restricts the use of public funds to secular degrees.

III. States Have Important Roles In Establishing Church-State Policies That Fall Between The Free Exercise And Establishment Clauses

States have a vital interest in setting appropriate limits on the use of public monies to support religion and in the proper accommodation of religious practices. States have come to differing conclusions on how best to balance these competing concerns to achieve religious liberty. The Ninth Circuit's ruling unduly impinges upon the ability of States to make their own decisions regarding how best to attain that equipoise. In essence, its decision holds that if funding of sectarian studies is not prohibited by the Establishment Clause, it is mandated by the Free Exercise Clause. This approach has not been, and should not be, recognized by the Court.

A. The Ninth Circuit Ruling Eliminates The Constitutional Separation Between The Religion Clauses

Following the Ninth Circuit's rationale, a State would never be able to favor a greater separation between church and state than that set by this Court

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Rosenberger specifically noted that the Virginia program did not exempt "religion" as a subject matter -- an exclusion the Court intimated may be permissible under its forum analysis. *Id.* at 830-31. Instead, it excluded the religious viewpoint from the discussion of issues already included within the forum. *Id.; see Good News Club v. Milford Central School*, 533 U.S. 98, 107 (2001) (barring religious groups from forum on morals and character development is viewpoint discrimination). Washington's program is just the opposite. It excludes the subject matter of theology degrees, while permitting recipients to espouse religious perspectives on any subject included within the forum. Scholarship programs frequently limit eligibility to recipients who pursue certain courses of study, such as the sciences or teaching. If a scholarship is deemed a forum, then these kinds of eligibility limitations rightly define the subject-matter parameters of the forum.

with regard to Establishment Clause. In the Ninth Circuit's judicial world, State decisions concerning religious liberty are either mandated or prohibited; no space is left between the Free Exercise Clause and the Establishment Clause for States to enact reasonable legislation. Such a rule federalizes and eliminates any meaningful role for the States in establishing church-state policy. Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, And The Next Round Of Constitutional Battles*, 78 Notre Dame L. Rev. 917, 965 (2003). Moreover, it is directly at odds with prior decisions of this Court that recognize a separation between the Religion Clauses.

In *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970), for example, the Court held:

> The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. . . . [W]e will not tolerate either governmentally established religion or governmental interference with religion. Short of those extremely proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and interference.

Accord Luetkemeyer v. Kaufman, 364 F. Supp. 376, 386 (W.D. Mo. 1973) ("The Supreme Court has clearly indicated that there is an area of activity which falls between the Establishment Clause and the Free Exercise Clause in which action by a state will not

violate the former nor inaction, the latter."), *aff'd*, 419 U.S. 888 (1974); *see Tilton v. Richardson*, 403 U.S. 672, 677 (1971) (attempting to define the "boundaries of the neutral area between these two provisions [the Religion Clauses] within which the legislature may legitimately act").

The Court's decisions on permissible accommodations of religion further compel the conclusion that an important constitutional separation exists between the Religion Clauses. *Walz*, itself an accommodation case, stated that: "the limits of permissible state accommodation to religion are by no means coextensive with the non-interference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself." 397 U.S. at 673. *Accord Smith*, 494 U.S. at 890 ("But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required."); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (government may "'accommodate religious practices and that it may do so without violating the Establishment Clause'" (quoting *Hobbie*, 480 U.S. at 144-45)); *see Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (government may confer benefits upon religious groups under certain circumstances even if not required by the Free Exercise Clause); *Lyng*, 485 U.S. at 452-54 (rejecting mandatory exemption under Free Exercise Clause but stating: "[n]othing in our opinion should read to encourage governmental insensitivity to the religious needs of any citizen . . . and should not discourage [the government] from accommodating religious practices").

If, as the Ninth Circuit's rule would have it, there is no room between the Religion Clauses for legislation concerning religion, cases such as those cited above would not have charged legislatures with the task of determining whether to accommodate the religious beliefs of their citizens. Contrary to the opinion below, this Court's precedents grant States the ability to draft reasonable legislation that negotiates the channel between the Free Exercise Clause and the Establishment Clause in order to attain religious freedom.

B. States Must Retain The Ability To Craft Constitutional Provisions And Laws That Fall Between The Demands Of The Religion Clauses

The unique histories and experiences of the States have resulted in various and distinct approaches to achieving religious freedom. Some States have interpreted their Constitutions to be co-extensive with the federal Religion Clauses. *See People v. Falbe*, 727 N.E.2d 200, 207 (2000) (establishment provisions same).[7] As shown below, some States choose to afford greater protections against the establishment of religion than does the Establishment Clause, while some mandate greater accommodation for religion than would be required under the Free Exercise Clause. Such divergence is reflected in State Constitutions and

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[7] *Accord Kotterman v. Killian*, 972 P.2d 606, 622 (Ariz.) (establishment clauses same), *cert. denied*, 528 U.S. 921 (1999); *Appeal of Springmoor, Inc.*, 498 S.E.2d 177, 180 (N.C. 1998) (adopting law of both Religion Clauses); *State v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 761 (Tenn. Ct. App. 2001) (free exercise principles the same); *see also Jabr v. Rapides Parish School Bd.*, 171 F. Supp. 2d 653, 659 n.5 (W.D. La. 2001) (Louisiana and federal establishment clauses identical).

laws throughout the county. And it is a diversity that is to be cherished.

For example, at least nineteen States have Constitutions that either expressly or through judicial interpretation afford a greater protection against the use of government monies to support religious activities than does the Establishment Clause.[8] Based on such provisions, State programs respecting religion sometimes fare differently under State Constitutions than they would under the First Amendment.[9] While this Court has found no Establishment Clause violation in government plans that pay for textbooks loaned and student transportation provided to parochial schools -- *Board of Education v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) -- State courts have rejected such programs as a matter of State constitutional law. *See, e.g., California Teachers Ass'n v. Riles*, 632 P.2d 953, 963-64 (Cal. 1981) (textbooks).[10]

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[8] *See* Cal. Const. art. XVI, §5; Del. Const. art. X §3; Fla. Const. art. I, §3; Ga. Const. art. I, §2, ¶VII; Haw. Const. art. X, §1; Idaho Const. art. IX, §5; Ky. Const. §189; Mass. Const. art. XLVI, §2; Mo. Const. art IX, §8; Mont. Const. art. X, §6; Nev. Const. art. XI, §10; N.M. Const. art. XII, §3; N.D. Const. art. VIII, §5; Okla. Const. art. II, §5; Or. Const. art. I, §5; S.D. Const. art. VI, §3, art. VIII, §16; Tex. Const. art. I, §7; Vt. Const. ch. 1, art. 3; Wyo. Const. art. I, §19.

[9] In the somewhat analogous context of aid to parochial schools, one commentator has categorized State Constitutions into three types: restrictive against aid (17 states), permissive in favor of aid (14 states) and uncertain (19 states). Frank Kemerer, *The Constitutional Dimension of School Vouchers*, 3 Tex. F. on C.L. & C.R. 137 (1998) (collecting and analyzing constitutional provisions concerning religious aid); Frank Kemerer, *State Constitutions and School Vouchers*, 120 Educ. L. Rep. 1 (1997) (same).

[10] *Accord Matthews v. Quinton*, 362 P.2d 932, 942-43 (Alaska) (transportation), *cert. denied*, 368 U.S. 517 (1961); *Opinion of the Justices*, 216 A.2d 668, 671 (Del. 1966) (transportation); *Spears v. Honda*, 449 P.2d 130, 138-39 (Haw. 1969) (transportation); *Fannin v. Williams*, 655 S.W.2d 480, 483-84 (Ky. 1983) (textbooks); *Paster v. Tussey*, 512 S.W.2d 97, 103-04 (Mo. 1974) (textbooks), *cert. denied sub nom. Reynolds v. Paster*, 419 U.S. 1111 (1975); *Board of Educ. v. Antone*, 384 P.2d 911, 912-13 (Okla. 1963) (transportation); *Dickman v. School Dist. No. 62C*, 366 P.2d 533, 545 (Or. 1961) (textbooks), *cert. denied sub nom. Carlson v. Dickman*, 371 U.S. 823 (1962); *McDonald v. School Bd.*, 246 N.W.2d 93, 96 (S.D. 1976) (textbooks).

The States discussed above erect a higher wall between church and state than exists under the federal Constitution, not as a form of discrimination, but as a reflection of their peoples' belief that government support of religious activities is, ultimately, damaging both to religion and government. *See McCollum*, 333 U.S. at 212. They also seek to address a significant governmental concern over compelling citizens to subsidize religious beliefs and practices with which they may stridently disagree. *See Everson*, 330 U.S. at 9, 13 ("early settlers came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches"). As the Washington Supreme Court has noted, the religion clauses of the Washington Constitution:

> have not been the work of the enemies, but of the friends of religion. It is not that the men who framed and the people who adopted these constitutional enactments were wanting in reverence for the Bible, and respect and veneration for the sublime and pure morality taught therein, but because they were unwilling that any avenue should be left open for the invasion of the right of absolute freedom of conscience in religious affairs; because that they were unwilling that

> any man should be required, directly or indirectly, to contribute toward the promulgation of any religious creed, doctrine or sentiment to which his conscience did not lend full assent.

State ex rel. Dearle v. Frazier, 173 P. 35, 35 (Wash. 1918) (quoting 1 Op. Att'y Gen. 142 (1891)).

Vermont is a telling case in point. Vermont's Constitution is of colonial vintage; it was adopted when Vermont became an independent republic in 1777. Article 3 of the Vermont Constitution provides that "no person ought to, or of right can be compelled to . . . support any place of worship . . . contrary to the dictates of conscience." Vt. Const. Ch. I, art. 3. This provision was taken from the earlier Constitution of the Commonwealth of Pennsylvania, which had

> "established the broadest religious liberty in colonial America . . ., and [t]he colony incorporated into its laws . . . a refusal to provide public tax support for churches and clergy." Curry, *supra*, at 75. The constitutional non-support language goes back to the 1682 Frame of Government of the commonwealth. *See id.*

Chittenden Town School Dist. v. Dep't of Educ., 738 A.2d 539, 556 (Vt. 1999) (quoting T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986)).

Drawing on the text of Article 3, its historical contexts and decisions construing analogous constitutional provisions from other States, the Vermont Supreme Court concluded that Article 3 was

not co-extensive with the Establishment Clause. 738 A.2d at 549 ("payment scheme that does not offend the First Amendment is [not] necessarily consistent with Article 3"). This led the Court to find that a school-funding system that afforded public tuition grants to students who could choose to use them at sectarian schools -- without regard to whether the funds would be used for religious education -- would violate Article 3. 738 A.2d at 562-63; *see also Holmes v. Bush*, 2002 WL 1809079 (Fla. Cir. Ct. 2002) (Florida's Constitution does not permit tuitioning plan to include sectarian schools).

The Court predicted that such a system would pass muster under the First Amendment because the private choice of the student vitiated any Establishment Clause concern, but held that: "We cannot conclude, however, that parental choice has the same effect with respect to Article 3." 169 Vt. at 343, 738 A.2d at 563. The concurring opinion explained the distinction by noting that the Establishment Clause is written in terms of prohibiting the government from establishing religion while Article 3 grants special protection to citizens to ensure their tax dollars are not used to finance religion. 169 Vt. at 346-47, 738 A.2d at 565 (Johnson, J., concurring).[11]

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[11] A number of courts have found no Free Exercise problem with State programs that do not permit public monies to be spent on religious education, even when such funding is available for private, non-sectarian education. *Chittenden Town School Dist.*, 738 A.2d at 563; *see Strout*, 178 F.3d at 65 (upholding tuitioning statute that did not permit public monies to be used for attendance at religious schools); *Bagley v. Raymond School Dep't*, 728 A.2d 127, 134-35 (Me.) (same), *cert. denied*, 528 U.S. 947 (1999); *see also McCarthy v. Hornbeck*, 590 F. Supp. 936, 943-44 (D. Md. 1984) (State not required to fund transportation for parochial schools); *Epeldi v. Engelking*, 488 P.2d 860, 866-67 (Idaho 1971), *cert. denied*, 406 U.S. 957 (1972) (same).

States could rightly conclude that forcing such payments might breed animosity and resentment toward religion. Such a concern is neither insignificant nor constitutionally suspect. *See* Abner Greene, *Why Vouchers are Unconstitutional and Why They're Not*, 13 Notre Dame J.L. Ethics & Pub. Policy 397, 401-02 (1999) (compelling persons to pay for religious schools akin to forced speech); Kathleen Sullivan, *Parades, Public Squares and Voucher Payments: The Problems of Government Neutrality*, 28 Conn. L. Rev. 243, 256 (1996) (noting danger of forcing citizens to fund religious messages with which they disagree); Michael McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv. L. Rev. 989 (1991) (requiring taxpayers to fund religions they do not accept "is understood to violate their religious conscience").[12]

Just as some States diverge from the Establishment Clause, other State Constitutions and laws grant greater accommodations for religious practices than is required by the Free Exercise Clause. For example, the Minnesota Supreme Court has consistently held that "Minnesotans are afforded greater religious liberties against governmental action under the state

[12] That Washington's relevant constitutional provision is a so-called Blaine Amendment does not counsel a different result. While the original impetus for some such provisions may have been a desire to restrict public monies from supporting Catholic schools, the adopted amendment here has a broader and non-discriminatory scope. *See Frazier*, 173 P. at 35; Derek Green, *Note, Does Free Exercise Mean Free State Funding? In Davey v. Locke, The Ninth Circuit Undervalued Washington's Vision Of Religious Liberty*, 78 Wash. L. Rev. 653, 680 n.271 (2003) (Washington's constitutional prohibition on religious funding reflects a "lack of hostility toward religion generally" (quoting Robert Utter and Edward Larson, *Church State On The Frontier: The History Of The Establishment Clause In The Washington Constitution*, 15 Hastings Const. L.Q. 451, 472 (1988))).

constitution than under the First Amendment of the federal constitution." *State v. Hershberger,* 462 N.W.2d 393, 397 (Minn. 1990). Based on such reasoning, the Court refused to adopt this Court's ruling in *Employment Division v. Smith,* and developed its own standard to determine whether general State laws adversely affect religion. 462 N.W.2d at 396-98. Indeed, a number of States have rejected the *Smith* approach in favor of greater protections for free exercise under State Constitutions. *See, e.g., Humphrey v. Lane*, 728 N.E.2d 1039, 1045, *cert. denied*, 531 U.S. 263 (Oh. 2000).[13] Such efforts are also reflected in State statutes. *See, e.g., Vineyard Christian Fellowship of Evanston v. City of Evanston*, 250 F. Supp. 2d 967, 993-94 (N.D. Ill. 2003) (Illinois Religious Freedom Restoration Act, 775 Ill. Comp. Stat. Ann. 35/15, enacted to establish a more searching analysis than required by *Smith*).[14]

A decision upholding the Ninth Circuit's ruling would bring the constitutionality of the State Constitutions and laws described above into question. More significantly, it would remove States from the policy debate concerning the proper role of government *viz* religion. States take diverse paths to religious

[13] *Accord Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280-81 (Alaska), *cert. denied*, 513 U.S. 979 (1994); *Attorney General v. Desilets*, 323, 636 N.E.2d 233, 236 (Mass. 1994); *Snyder v. Murray City Corp.*, No. 20010203, 2003 WL 1860524, at *4 (Utah Apr. 11, 2003); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 185-88 (Wash. 1993); *State v. Miller*, 549 N.W.2d 235, 239 (Wis. 1996); *see United States v. Boyll*, 774 F. Supp. 1333, 1339 (D.N.M 1991) (collecting State laws exempting religious usage from statutes criminalizing use of peyote).

[14] Of course a State can transgress the Constitution if it offers too great an accommodation of religion. *See Board of Educ. v. Grumet*, 512 U.S. 687 (1994) (granting municipality-like status to sect created an establishment of religion).

freedom. Within reasonable limits, they should be able to establish a higher wall between church and state than does the Establishment Clause, without offending Free Exercise principles. Likewise, reasonable State efforts to afford greater protections to the exercise of religious beliefs than is required by the Free Exercise Clause should not be considered to be the establishment of religion or discrimination against "non-religion." So long as the constitutional provisions or laws rest in the permissible area between the two Religion Clauses, States must be granted the opportunity to come to their own conclusions as to how best to achieve religious liberty.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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